Supreme Court, U.S.
FILED

99 5 17 SEP 23 1999

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MIGUEL ROJAS RIVERA,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COUNSEL OF RECORD
FLOYD D. HOLDER, JR.,
Law Firm of Floyd D. Holder, Jr.
1001 Main, Suite 801
Lubbock, TX 79401
(806) 763-9296
TX State Bar No. 09832500

LYNETTE HAMMOND, Attorney at Law
1001 Main, Suite 806
Lubbock, TX 79401
(806) 749-2889
TX State Bar No. 00798234

ATTORNEYS FOR PETITIONER,
MIGUEL ROJAS RIVERA

30PP

QUESTIONS PRESENTED

I. **Was the application of a U.S.S.G. § 3B1.1(a) penalty enhancement to Petitioner's sentence error where the Petitioner was neither a leader nor an organizer of criminal activity, and, alternatively, there were not five or more participants in the criminal activity?**

II. **Did the Fifth Circuit's decision, which is in conflict with the decisions of other federal courts, accurately represent the law of U.S.S.G. §3B1.1(a)?**

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i
TABLE OF CONTENTS.....ii
INDEX TO APPENDICES.....iii
TABLE OF AUTHORITIES.....iv
OPINION BELOW..... 2
JURISDICTION..... 2
GUIDELINES PROVISIONS INVOLVED.....2
STATEMENT OF THE CASE.....3
REASONS FOR GRANTING WRIT.....7
Overview.....7
Argument.....8
CONCLUSION.....18

INDEX TO APPENDICES

Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit, United States v. Miguel Rojas Rivera, No. 98-10883 (5th Cir. June 30, 1999) (per curiam) (unpublished manuscript op.)

Appendix B — U.S.S.G. § 3B1.1(a) (including commentary) (Nov. 1, 1998)

TABLE OF AUTHORITIES

CASES **PAGE**

United States v. Avila, 95 F.3d 887 (9th Cir. 1996)...10-12, 14

United States v. Avila, 905 F.2d 295 (9th Cir. 1990).....11

United States v. Ayala, 47 F.3d 688 (5th Cir. 1995).....10

United States v. Barnes, 993 F.2d 680 (9th Cir. 1993), cert. denied, 513 U.S. 827, 115 S.Ct. 96 (1994).....11

United States v. Boutte, 13 F.3d 855 (5th Cir. 1994).....17

United States v. Brown, 944 F.2d 1377 (7th Cir. 1991)..10, 14

United States v. Conley, 156 F.3d 78 (1st Cir. 1998).....12

United States v. Cyphers, 130 F.3d 1361 (9th Cir. 1997).....16

United States v. Gonzalez, 146 F.3d 712 (9th Cir. 1998).....11

United States v. Gypsum Co., 333 U.S. 364 (1948).....8

United States v. Harper, 33 F.3d 1143 (9th Cir. 1994), cert. denied, 513 U.S. 1118, 115 S.Ct. 917 (1995).....11

United States v. Loveless, 139 F.3d 587 (8th Cir. 1998).....12

United States v. Mares-Molina, 913 F.2d 770.....

(9th Cir. 1990).....11

United States v. Mays, 902 F.2d 1501 (10th Cir. 1990)..12, 14

United States v. McDowell, 918 F.2d 1004 .....

(1st Cir. 1990).....9, 16

United States v. Mullins, 992 F.2d 1472 (9th Cir. date), cert.

denied, 510 U.S. 994, 114 S.Ct. 556 (1993).....11

United States v. Ponce, 51 F.3d 820 (9th Cir. 1995).....10

United States v. Reid, 911 F.2d 1456 (10th Cir. 1990)...17, 18

United States v. Miguel Rojas Rivera, No. 98-10883 .....

(5th Cir. June 30, 1999).....2

United States v. Roberts, 5 F.3d 365 (9th Cir. 1993).....11

United States v. Ronning, 47 F.3d 710 (5th Cir. 1995).....8

United States v. Smith, 131 F.3d 1392 (11th Cir. 1997), cert.

denied, 118 S.Ct. 1109 (1998).....12

United States v. Valencia, 44 F.3d 269 (5th Cir. 1995).....8

STATUTES

18 U.S.C § 2.....2, 3

18 U.S.C. 3742(A)(1) and (A)(2).....2

21 U.S.C. § 841(a).....2, 3

21 U.S.C. § 841(b)(1)(A)(viii).....2, 3

21 U.S.C. § 846.....2, 3

28 U.S.C. § 1254(1).....2

GUIDELINES

U.S.S.G. § 3B1.1(a).....8-10, 12, 16-18

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MIGUEL ROJAS RIVERA,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals filed June 30, 1999.

OPINION BELOW

The opinion of the Court of Appeals, United States. v. Miguel Rojas Rivera, No. 98-10883 (5th Cir. June 30, 1999) (per curiam) is unpublished. A copy of the manuscript opinion is attached as Appendix A.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on June 30, 1999. See Appendix A. This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1). The District Court had jurisdiction of this case as a criminal matter pursuant to accusations under 18 U.S.C. 2; 21 U.S.C. 841(a); and 21 U.S.C. 841 (b)(1)(A)(viii); and 21 U.S.C. 846. The Court of Appeals had jurisdiction pursuant to 18 U.S.C. 3742 (A)(1) and (A)(2).

GUIDELINE PROVISIONS INVOLVED

Section 3B1.1(a) of the United States Sentencing Guidelines, including its commentary, is set forth in Appendix B.

STATEMENT OF THE CASE

A. Proceedings Below

On December 17, 1997, Petitioner Miguel Rojas Rivera was indicted on: one count of conspiracy to possess with the intent to distribute one kilogram or more of methamphetamine in violation of Title 21 United States Code Section 846, and one count of possession with the intent to distribute one kilogram or more of methamphetamine and aiding and abetting in violation of Title 21 United States Code Sections 841 (a)(1) and (b)(1)(A)(viii); and Title 18 United States Code Section 2.

On April 8, 1998, Petitioner was convicted by a jury on all counts. On July 24, 1998, Petitioner was sentenced to 360 months in prison, 5 years supervised release, and a $200 special assessment as to counts 1 and 2.

Petitioner filed a timely Notice of Appeal as to the judgment and sentence imposed. The appeal was heard before the United States Court of Appeals for the Fifth Circuit. That court affirmed Petitioner's convictions and sentence. See United States v. Miguel Rojas Rivera, No. 98-10883, (5th Cir. June 30, 1999) (per curiam) (unpublished manuscript op.). See Appendix A.

B. Statement of Relevant Facts

1. Facts Relating to the Offense

On November 20, 1997, authorities of the New Mexico State Police discovered more than five kilograms of methamphetamine hidden in a vehicle stopped by Officer Nick Ramos near Albuquerque. Subsequent to this stop, the

adults in the vehicle (Francisco Reyes, Jose Puga, and Maria Puga) agreed to cooperate with the police in establishing a "controlled delivery." This delivery was designed so that authorities might apprehend and arrest the suspected recipients of the methamphetamine. To that end, Reyes and Jose Puga proceeded with the intended delivery as per the initial plan. In conjunction with this controlled delivery, the authorities established careful surveillance of Reyes and Puga to ensure that all events transpired according to their plan.

The DEA and Lubbock Police Department determined that it would be more convenient to monitor this delivery if Reyes and Puga feigned car trouble, thereby having Petitioner come to them. Accordingly, after their arrival in Lubbock, Reyes requested Petitioner's assistance in repairing the delivery truck. Petitioner complied with this request, and arrived shortly thereafter to inspect the vehicle. Petitioner was accompanied by Wblester (pronounced Wblester) Rodriquez.

The delivery truck was soon "repaired," and the four men (Puga, Reyes, Petitioner, and Rodriquez) proceeded to storage units rented by Petitioner and Rodriquez where the delivery of the methamphetamine was to be expedited. After visiting the first storage unit and exchanging possession of the drugs, the four men continued to a second storage unit. Upon leaving the second unit, the authorities acted, arresting all four men, including Petitioner.

The investigation revealed a drug operation in Los Angeles, California being directed by what was termed the mysterious "They." According to the trial testimony of co-conspirators Reyes and Puga, "They" coordinated the transaction from California in many aspects by: (1) providing the delivery truck; (2) contacting Reyes when a trip to Lubbock was necessary; (3) instructing Reyes where to leave the vehicle; (4) suggesting that Puga's wife and children be

included on the journey; and (5) suggesting an alibi if Puga, his family, and Reyes should be stopped by police.

Two of the government's cooperating witnesses (Francisco Reyes & Jose Puga) testified that in September 1997, they transported from Los Angeles to Lubbock some substance which was delivered to Petitioner. None of the witnesses had any knowledge as to what they were carrying. The "mules" met Petitioner and Wblester Rodriquez at a gas station and then proceeded to a garage to make the exchange. An unidentified man was at the garage during these events. For their efforts, Reyes was paid $3,000 and Puga $1,000. The couriers then returned to Los Angeles and left the truck as "They" had instructed.

Petitioner was a resident of Midland, Texas, but had been living and working in the Lubbock area just prior to his arrest. While working in Lubbock and Brownfield as a roofer, Petitioner was living in an unfurnished mobile home and driving a twenty-year old Chevrolet pick-up truck. Although Petitioner was employed prior to his arrest, he had spent considerable time in the recent past collecting unemployment.

2. Relevant Procedural Facts

At sentencing, over objection, Petitioner's punishment was increased ten additional years under the guise of United States Sentencing Guideline § 3B1.1(a). This enhancement was applied upon the court's determination that Petitioner was the leader/organizer of the criminal activity underlying this conviction. Petitioner challenged the district court's application of § 3B1.1(a) on appeal in asserting that such an enhancement was improper because there was no credible evidence whatsoever that Petitioner was a leader/organizer or the conspiracy involved five or more participants. The court

of appeals rejected Petitioner's challenge. See Rivera, manuscript op. at 2. (See Appendix A.)

REASONS FOR GRANTING THE WRIT

Overview

The underlying goal of the federal sentencing guidelines is to create uniform treatment throughout the federal courts. Certainly, it shocks the conscience that an individual may be sentenced to an additional ten years imprisonment depending upon which federal circuit is to hear one's case. Different treatment and application of the sentencing guidelines among the circuits has resulted in discordant treatment and substantially distinct sentences for the same conduct. In the present case, a ten-year difference between the circuits has created a question that only the United States Supreme Court can address. Failure to grant certiorari will continue the disparaging treatment and fundamental unfairness between the circuits.

For these reasons, as more fully explained in the Argument section below, this Court should grant certiorari to consider the following questions:

I. **Was the application of a U.S.S.G. § 3B1.1(a) penalty enhancement to Petitioner's sentence error where the Petitioner was neither a leader nor an organizer of criminal activity, and, alternatively, there were not five or more participants in the criminal activity?**

II. **Did the Fifth Circuit's decision, which is in conflict with the decisions of other federal courts, accurately represent the law of U.S.S.G. §3B1.1(a)?**

ARGUMENT

Petitioner contends that the district court erred in imposing a four-level enhancement to his sentence based on United States Sentencing Guidelines ("U.S.S.G.") §3B1.1. This enhancement was applied as a result of the district court's conclusion that Petitioner was an organizer or leader of a criminal enterprise. However, had the case been decided by another circuit, the role enhancement would not have been applied. Consequently, the penalty enhancement applied to Petitioner's sentence by the Fifth Circuit presents a division of opinion among the federal courts which invokes this Court's jurisdiction to review the matter.

A. Standard of Review

A district court's finding that a defendant was an organizer or leader is reviewed for clear error. United States v. Ronning, 47 F.3d 710, 711 (5th Cir. 1995). The District Court's determination must also be plausible in light of the record as a whole. United States v. Valencia, 44 F.3d 269, 272 (5th Cir. 1995). Thus, a factual determination is clearly erroneous when review of the entire evidence leaves the court with a "definite and firm conviction that a mistake has been committed." United States v. Gypsum Co., 333 U.S. 364, 365 (1948).

B. U.S.S.G. 3B1.1(a)

The district court enhanced Petitioner's offense level by four levels after determining that U.S.S.G. §3B1.1(a) applied. U.S.S.G. §3B1.1(a) (1998) states in part:

> Based on the defendant's role in the offense, increase the offense level as follows:

> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by four levels.

The commentary to this enhancement provides that "to qualify for an enhancement under this section, the defendant must have been an organizer, or leader . . . of one or more participants." Id. n2. The enhancement is also not applicable if five or more participants were not involved in the criminal activity. United States v. McDowell, 918 F.2d 1004, 1011 (1st Cir. 1990). The commentary further provides that a participant is one "who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. §3B1.1 n.1.

Additionally, the commentary suggests that the following factors be considered in making the organizer or leader determination:

(1) the exercise of decision making authority
(2) the nature of participation in the commission of the offense
(3) the recruitment of accomplices
(4) the claimed right to a larger share of the fruits of the crime
(5) the degree of participation in planning or organizing the offense
(6) the nature and scope of the illegal activity
(7) the degree of control and authority exercised over others

U.S.S.G. § 3B1.1 n.4. In considering the factors listed above, a district court is obligated to establish an acceptable

evidentiary basis for its conclusions. United States v. Ayala, 47 F.3d 688, 690 (5th Cir. 1995).

C. Federal Circuit Interpretation and Application of the Role Enhancement

The Seventh and Ninth Circuits, as well as several others, have reviewed the application of the organizer or leader role enhancement under U.S.S.G. § 3B1.1. In their analysis, the appellate courts have consistently regarded evidence of the defendant's decision making authority or control over others to be a pivotal factor in applying the organizer or leader role enhancement. The Seventh Circuit has stated that §3B1.1 of the Guidelines is concerned with relative responsibility and "those who play an aggravating role in the offense are to receive sentences that reflect their greater contributions to the illegal scheme." United States v. Brown, 944 F.2d 1377 at 1381 (7th Cir. 1991).

In Brown, the court of appeals held that proper application of the enhancement required evidence beyond identifying a defendant as a middleman or distributor who permitted shipments to be unloaded at his residence and, at least once, oversaw the unloading of a shipment at his home. The sentence increase would have been proper if evidence were presented to suggest that the defendant claimed a right to a larger cut of the profits, exercised any control over the customers to whom he sold drugs, recruited dealers, or organized the amount of the drug shipments.

Similarly, the Ninth Circuit has consistently interpreted the organizer or leader enhancement to require evidence that the defendant exercised some degree of control or organizational authority over others. See, e.g., United States v. Avila, 95 F.3d 887 (9th Cir. 1996); United States v. Ponce, 51 F.3d 820, 827 (9th Cir. 1995) (finding organizer or leader enhancement appropriate where defendant oversaw

procurement and distribution of drugs); United States v. Roberts, 5 F.3d 365, 371 (9th Cir. 1993); United States v. Barnes, 993 F.2d 680, 685 (9th Cir. 1993), cert. denied, 513 U.S. 827, 115 S.Ct. 96, (1994); United States v. Mullins, 992 F.2d 1472, 1479 (9th Cir.), cert. denied, 510 U.S. 994, 114 S.Ct. 556, (1993); United States v. Avila, 905 F.2d 295, 298-99 (9th Cir. 1990) (finding enhancement proper where defendant, who was a "heavy drug dealer," procured and distributed the drugs from numerous sources and also negotiated the price of the substances); United States v. Harper, 33 F.3d 1143, 1150 (9th Cir. 1994) cert. denied, 513 U.S. 1118, 115 S.Ct. 917, (1995) (four-point upward-adjustment appropriate when a preponderance of the evidence supports a finding that the defendant was an organizer or leader, "not merely that the defendant was more culpable than others who participated in the crime"); United States v. Mares-Molina, 913 F.2d 770, 773 (9th Cir. 1990) (evidence failed to show that defendant exercised control or was otherwise responsible for organizing, supervising, or managing others in the commission of the offense); and United States v. Gonzalez, 146 F.3d 712, 717 (9th Cir. 1998) (not applied when defendant was middleman in drug transaction with no decision making authority).

Specifically, the Ninth Circuit's decision and reasoning in Avila (95 F.3d 887) is particularly important. The Court held that the organizer or leader role enhancement was not applicable because the defendant did not clearly exercise control over his co-conspirators. As the go-between for the buyer and seller and the sole negotiator with the confidential informant, the defendant obtained and mailed samples of cocaine, negotiated a $1,000 personal fee for each kilogram, drove to various locations to obtain drugs and transported them to the site, and even accepted armed assistance. Although the defendant may have participated in arranging the transaction on behalf of the seller, thereby making him more culpable than some of his codefendants,

the court of appeals maintained a definite and firm conviction that the district court committed a mistake by applying the aggravating role enhancement.

Further, the court pointed out that Avila "did not independently negotiate the key element of the transaction: the price of the cocaine." Id. at 891. Other participants negotiated the price and controlled the scope of the transaction. Even considering the fee he negotiated for himself, the court noted that Avila still did not stand to profit the most from the transaction. Moreover, "the fact that he was accompanied by two other participants in the conspiracy, in the absence of any evidence that he exercised control or authority over them," was similarly insufficient to justify the organizer or leader enhancement.

Likewise, several other circuits have considered similar cases to determine whether an organizer or leadership role enhancement under § 3B1.1(a) is or is not warranted in a given set of facts. See e.g., United States v. Conley, 156 F.3d 78, 85 (1st Cir. 1998) (applied for defendant's leadership role in recruiting at least five members of drug smuggling ring); United States v. Loveless, 139 F.3d 587, 594 (8th Cir. 1998) (applied when defendant recruited at least two members of drug operation); United States v. Mays, 902 F.2d 1501, 1503, (10th Cir. 1990) (mere buyer/seller relationship is insufficient to prove aggravating role); United States v. Smith, 131 F.3d 1392, 1398 (11th Cir. 1997) (applied when defendant recruited accomplices and directed them to sell and purchase methamphetamine), cert. denied, 118 S. Ct. 1109 (1998).

In summary, if petitioner's case were heard by any of the above circuits, the outcome would have differed substantially. This division of opinion among the federal circuit courts of appeal justifies this Court's exercise of its certiorari jurisdiction to grant certiorari in this case.

Moreover, the application of an organizer or leader role enhancement pursuant to the Federal Sentencing Guidelines is an extremely important one, which will add 10 years to the defendant's sentence in this case.

D. The Improper Application of the Role Enhancement

The aggravating role adjustment is targeted for the most culpable defendant(s) in an offense. The test to be applied is two-pronged: (1) Whether defendant acted as an organizer or leader; and (2) What was the size of the organization? If these factors are present, the court should apply a four-level enhancement if the defendant was an organizer or leader of a criminal activity involving 5 or more participants. However, if these factors are absent, no enhancement can be proper.

Petitioner's role in the criminal activity surrounding this case can be described in very simple and concise prose: He was one of two men who met Jose Puga and Francisco Reyes to accept a delivery from Los Angeles. At best, the evidence may categorize Petitioner as another courier in the transportation process or a distributor. However, he was by no means a leader, organizer, or person of power within the drug smuggling transaction. Petitioner's role was no greater than the other individuals involved; yet, Petitioner alone received a sentence enhancement for supposedly acting as an organizer or leader.

1. Who was the Organizer or Leader

Petitioner's enhancement was based wholly on the testimony of witnesses without credibility who asserted that Petitioner made arrangements for the couriers. However,

there is no corroborating evidence that Petitioner had any input as to the arrangements for the delivery. In contradiction of the assertion, the couriers also testified that "They" in California, provided the car and hid the drugs in the car. There is, likewise, no corroborating evidence that Petitioner purchased, obtained, or directed that the vehicle be delivered to the couriers. In fact, Petitioner lacked decision making authority in the arrangements for the shipment.

From the testimony of Reyes and Puga, it is evident that the mysterious "They" coordinated the transaction from California. Clearly, "They" exercised decision making authority and control in recruiting Reyes and Puga. "They" provided the delivery vehicle and hid the drugs in the vehicle. "They" instructed Reyes on where to leave the vehicle. "They" requested that Puga's family go along to give the impression of a family vacation. And, "They" helped provide an alibi for their delivery boys should they be stopped by law enforcement officials.

The identity of "They" is certainly a mystery. "They" could very well be El Zorro, who Reyes explained as the source or supplier of the methamphetamine. Or, "They" could be a shadowy figure Reyes saw at an earlier delivery in Lubbock. Despite the shrouded identity of "They," two things are certain, "They" had a great deal of power and influence in determining how drugs were to be transported from Los Angeles, California to Lubbock, Texas; and "They" is not the Petitioner.

Following case law, Petitioner's limited role in unloading the truck cannot justify the enhancement. Brown, 944 F.2d at 1381. Similarly, an aggravating role is not sufficiently proven by indicating a mere buyer/seller relationship between the defendant and the participants. Mays, 902 F.2d at 1503. Like Avila, Petitioner did not negotiate the price or control the scope of the transaction. 95

F.3d at 891. The evidence, or lack thereof, clearly supports a definite and firm conviction that Petitioner was not an organizer or leader of the criminal activity.

Through out the course of his trial, the government methodically developed a picture of Petitioner Miguel Rivera. And as that picture came into focus, one item was particularly eye-catching: Petitioner did not *behave* like the power boss of a drug smuggling operation.

Consider, for example, his demeanor in response to the controlled delivery to Lubbock which was at least 75% less product than expected. Upon discovering the substantially smaller shipment, Petitioner reacted with a degree of nonchalant regard. His only response was "What happened? I was expecting more." When no explanation was given by the couriers, he proceeded with the business at hand and paid the money without further inquiry. Francisco Reyes described Petitioner as having acted "pretty normal" in the face of this business disaster. Jose Puga stated that while in jail, Petitioner was neither threatening nor intimidating.

Would a leader of a drug organization respond as Petitioner did in the face of losing so much valuable product? Arguably not. These facts more properly suggest that Petitioner was making a pick-up for someone else or making a purchase for distribution to another. Equally interesting is the nature of the government's examination of these witnesses. If the government believed Petitioner to be the boss, why did they not allow his co-conspirators to confirm these suspicions? In fact, none of these witnesses volunteer Petitioner as the leader of this conspiracy? Well over 400 pages of testimony, and none of it clarifies that Petitioner was the organizer or leader.

Additionally, Petitioner's lifestyle and standard of living was certainly not indicative of the choices one would

associate with that of an organizer of a drug ring spanning from California to Texas. Petitioner lived in a run-down, unfurnished mobile home in Lubbock, Texas and drove a twenty-year old pick-up. He did not own modest, much less lavish, possessions nor did his presence create a suspicion of wealth.

Finally, characterizing Petitioner as an organizer or leader would have required an extraordinarily creative interpretation of the evidence. The more literal perspective, however, revealed a man who met few, if any, leadership qualities. We saw no decision making authority. No planning and organizing. No control over others. No large share of the profits being directed to this welfare recipient living in an unfurnished trailer. What we did see, in fact, was the mysterious "They" making the decisions, supplying the drugs, planning the trips, and controlling the actions of Reyes and Puga. Although Petitioner may have been yet another mule, he was certainly no leader or organizer. He did not direct, he did not control, and he did not influence.

2. Who Were The Participants

Petitioner clearly was not the leader of this conspiracy. Moreover, if he were, the penalty enhancement would still fail the second prong of the test for want of the necessary involvement of five or more participants. U.S.S.G. § 3B1.1(a). The commentary accompanying §3B1.1 provides that a participant is one who is criminally responsible for the offense. Id. at n.1. A specific finding based on a preponderance of the evidence must indicate the participants with sufficient "particularity to give credence to the upward adjustment." McDowell, 918 F.2d at 1011. Also, unknown co-conspirators cannot be included in arriving at five or more participants. United States v. Cyphers, 130 F.3d 1361, 1363 (9th Cir. 1997). The number

of participants should include the defendant, persons recruited by the defendant, and individuals controlled by the defendant. United States v. Reid, 911 F.2d 1456, 1464 (10th Cir. 1990).

The enhancement does not pertain to Petitioner's case because he was not an organizer or leader, and the conspiracy with which he was involved did not have five participants. First, there was not a specific finding that pinpointed five criminally responsible co-defendants. The government alleged Petitioner was an organizer or leader over Wblester Rodriquez, Jose Puga, Maria Puga, Francisco Reyes, and unknown co-conspirators including "Flaco." There is no evidence that Maria Puga had any knowledge of the nature of the trip to Lubbock; nor is there any evidence that Petitioner directed Jose Puga to bring his wife. See United States v. Boutte, 13 F.3d 855 (5th Cir. 1994) (to qualify as a participant, an individual must knowingly participate in some part of the criminal enterprise.) Also, Maria Puga was never charged with any crime.

Under a proper analysis, Maria Puga is eliminated by way of her not being "criminally responsible" for the offense. U.S.S.G. § 3B1.1 n.1. The government considered "Flaco" to be an unknown co-conspirator who must also be eliminated for lack of being "criminally responsible" for the offense. Id. Further, it is possible that a mere buyer/seller relationship existed here with Reyes and Puga transporting methamphetamine, supplied by El Zorro, across the country to the purchaser's contact, Petitioner. (We emphasize that Petitioner could not have been a buyer because those who can afford to purchase large quantities of methamphetamine are not likely to spend their days as a roofer and their nights in a run-down trailer.) Petitioner took possession of the packages and paid Reyes and Puga. Upon further analysis, Reyes and Puga should be eliminated because there is no evidence to prove that Reyes and Puga, as suppliers, were

answerable to the defendant. See Reid, 911 F.2d at 1465. Consequently, we are left with Petitioner and Wblester Rodriquez; two participants in a conspiracy clearly not managed, organized, led, or controlled by Petitioner.

There is no evidence that Petitioner controlled or directed Rodriquez. According to testimony, Rodriquez independently decided to take possession of the remaining methamphetamine while at the storage unit. It was clearly Rodriquez's decision, and not Petitioner's directive, to carry the drugs rather than leave them for the ultimate purchaser.

Summary

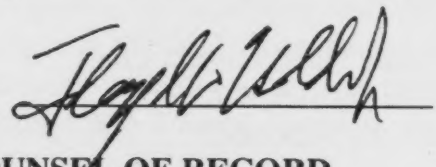
In conclusion, application of the federal sentencing guidelines is intended to ensure consistent treatment of federal offenders and thereby eliminate unwarranted sentencing disparity. The sentence should accurately reflect the seriousness of the offense and impose no greater restraint than necessary on the offender. Specifically, an aggravating role adjustment under U.S.S.G. § 3B1.1(a) cannot apply unless the evidence supports a finding that the defendant exercised organizational or leadership control over a participant. In the case before us, the evidence overwhelmingly demonstrates that Petitioner was in no way an organizer or leader of any conspiracy, nor was this conspiracy comprised of five or more participants. The evidence clearly demonstrates that an organization in Los Angeles known to witnesses only as "They" organized and led this smuggling operation.

If the opinions of other federal courts are followed to apply the same reasoning to the petitioner's case, the obvious conclusion is that the District Court clearly erred by applying a 3B1.1(a) enhancement to Petitioner's sentence. The conflict between the decision of the Fifth Circuit when compared to the holding of other appellate courts warrants

this Court's exercise of its certiorari power to decide this case. The harm suffered by Petitioner in serving another decade in prison as a result of this injustice can only be cured by this Court's resolution. Because the theory that Petitioner acted as an organizer or leader in a criminal activity involving five or more participants bears no resemblance to the evidence and greatly exaggerates his involvement, Petitioner respectfully requests the Court to grant review.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted.

By: 

COUNSEL OF RECORD
FLOYD D. HOLDER, JR.,
Law Firm of Floyd D. Holder, Jr.
1001 Main, Suite 801
Lubbock, TX 79401
(806) 763-9296
TX State Bar No. 09832500

LYNETTE HAMMOND, Attorney at Law
1001 Main, Suite 806
Lubbock, TX 79401
(806) 749-2889
TX State Bar No. 00798234

ATTORNEYS FOR PETITIONER,
MIGUEL ROJAS RIVERA

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-10883
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WBLESTER PINEDA RODRIQUEZ;
MIGUEL ROJAS RIVERA,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:97-CR-96-2

Before EMILIO M. GARZA, BENAVIDES and STEWART, Circuit Judges. PER CURIAM:*

Wblester Pineda Rodriquez appeals from his conviction of possession with intent to distribute methamphetamine and conspiracy to possess with intent to distribute methamphetamine. Rodriquez and Miguel Rojas Rivera appeal from their sentences for both offenses. Rodriquez contends that the evidence was insufficient to support his conviction; that the district court erred by adjusting his offense level for obstruction of justice based on his trial testimony; and that the district court erred by declining to adjust his offense level for minimal participation. Rivera contends that the district court erred by adjusting his offense level because he was a leader or

organizer and that he received ineffective assistance of counsel at sentencing. Rodriquez and Rivera both contend that the district court erred by attributing methamphetamine from a September 1997 transaction to them.

The evidence at trial was sufficient to prove that Rodriquez knowingly possessed methamphetamine in November 1997 and that he intended to distribute that methamphetamine. *United States v. Cardenas,* 9 F.3d 1139, 1158 (5th Cir. 1993). The evidence was sufficient to prove an agreement to move methamphetamine from California to Texas; Rodriquez's knowledge of that agreement; and Rodriquez's voluntary participation in that agreement. *United States v. Ayala,* 887 F.2d 62, 67 (5th Cir. 1989).

The finding that Rodriquez committed perjury at trial was not erroneous. Rodriquez's testimony about his participation in the offense was directly contradicted by other evidence at the trial. The district court could have found that Rodriquez willfully gave false testimony concerning material matters. *See United States v. Dunnigan,* 507 U.S. 87, 94 (1993).

Rodriquez was sentenced on activity in which he actually was involved. No downward adjustment for Rodriquez's role in the offense was necessary. *United States v. Atanda,* 60 F.3d 196, 199 (5th Cir. 1995).

The finding that Rivera was a leader or organizer was not erroneous. There were five or more participants in Rivera's offense and the nature and extent of Rivera's participation in the offense were sufficient for a leader/organizer finding. *See United States v. Boutte,* 13 F.3d 855, 860 (5th Cir. 1994); *United States v. Barreto,* 871 F.2d 511, 512 (5th Cir. 1989).

Finally, the estimate used for the September 1997 drug run was not erroneous. *See United States v. Sherrod,* 964 F.2d 1501, 1508 (5th Cir. 1992). The two drug runs were done in near-identical fashion; it was not unreasonable to assume that the same amount of methamphetamine was involved in both drug runs.

AFFIRMED.

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

S/

FILE DATE: Jun 30 1999, Charles R. Fulbruge III, Clerk

APPENDIX B

§ 3B1.1 Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised

management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.